United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: September 30, 1997

Case No. **95 INA 474**

In the Matter of:

STONE ARCH HEALTH CARE, INC.,
Employer,

On behalf of:

NUNILON RUBIA,
Alien.

Appearance: W. E. Panotes, Esq., of Jersey City, New Jersey

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NUNILON RUBIA (Alien) by STONE ARCH HEALTH CARE, INC., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On May 5, 1993, Employer filed for labor certification on behalf of the Alien to fill the position of "Cleaner, House-keeping Department." AF 01-33. The Employer received job applications from two U.S. workers. Employer rejected U. S. worker Judith Townsend in its letter of September 2, 1993, explaining that she had failed to return Employer's call and message of August 31, 1993.[1] By its letter of September 15, 1993, the Employer also rejected applicant Janet Ecker, as her telephone number was no longer valid and she failed to follow up on her employment application. AF 27.

In the Notice of Findings (NOF), the CO accepted Employer's rejection of Ms. Ecker. The CO found Employer's rejection of Ms. Townsend on grounds that she failed to return the August 31, 1993, telephone call to be unacceptable, because its act of leaving the message did not establish that Ms. Townsend received the message. When the Employer was unable to reach the applicant by telephone, said the CO, it should have attempted to contact the job applicant by mail. In the absence of evidence that it made a bona fide effort to reach her by mail, the CO reasoned that the Employer did not demonstrate that it had exhausted all available remedies it its effort to recruit a qualified U.S. worker to fill this position. AF 39.

The Employer said in rebuttal that it was not its practice to make numerous telephone calls to job applicants or to contact job applicants by mail, adding that such a practice would not be "feasible." Employer then speculated that Ms. Townsend had not provided her home telephone number since the individual who answered the telephone on September 1, 1993, first denied knowing her and then said he did not know when she would return. From this the Employer reasoned that Ms. Townsend might not have been interested in the job opportunity but merely was following a process to satisfy the requirements of the unemployment office. AF 40.

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[1]The Employer also said it attempted to telephone her on September 1, 1993, but did not indicate whether a message was left for Ms. Townsend at that time. The Employer said the person who answered the telephone first denied knowing Ms. Townsend, and then said he did not know when she would return. AF 23.

The Final Determination of January 10, 1995, concluded that Employer's rebuttal as to its attempts to contact Ms. Townsend did not demonstrate a good faith effort. In the absence of supporting evidence the CO did not accept Employer's assumption that the telephone number it used was not this applicant's home phone. Also noting that the Employer failed to use the emergency contact information that was provided on the application form, the CO denied Employer's application for labor certification.[2] Employer appealed from the CO's denial of alien labor certification on January 26, 1995. AF 55.

DISCUSSION

Although the regulations do not explicitly state a "good faith" effort must be made to contact US workers who have applied for the job opportunity, such a good faith requirement is implicit.[3] **H.C. LaMarche Enterprises, Inc.**, 87 INA 607(Oct. 27, 1988). The Employer's report of contact should indicate when or how many times it attempted to contact the U. S. worker by telephone, whether the attempts were made to her place of business or home, with whom any message was left, what that message said, and whether Employer attempted to use any alternative means of communication, such as a letter, to reach the job applicant.

Employer has documented the number of attempts to telephone Ms. Townsend at her home number. Employer has not, however, indicated what message was left on either of the two calls made to the home number. In addition, Employer did not attempt an alternative means of communication, such as a certified letter or telephone contact at the emergency contact number listed on Ms. Townsend's application.

Employer limited its attempts to communicate with Ms. Townsend to the act of telephoning her at the home phone number it was given, even though it also was given information for an emergency contact that included the name and telephone number of the sister of this job applicant. The Employer's behavior cannot be construed as a good faith effort to contact Ms. Townsend under the Act. While a reasonable effort to contact the qualified U.S. applicant would have required mailing a letter, this Employer's effort to contact Ms. Townsend was limited to the telephone call and the message it left on learning that she was not present. In

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[2]This refers to the name and telephone number of the sister of the job applicant. AF 43.

[3]Under 20 CFR § 656.21(b)(6), an employer must demonstrate that it rejected the U. S. worker who applied for the position solely for lawful, job-related reasons. 20 CFR § 656.20(c)(8) further provides that all jobs offered must clearly be open to any qualified U. S. worker.

spite of the contention in the Employer's rebuttal that sending such a followup letter was not feasible, it failed to offer evidence to prove that it could not have written letters to the two U. S. applicants for the position it was trying to fill. It is reasoned that good faith would have required the Employer to attempt to contact the U. S. applicants with a minimal effort by sending a certified letter where its attempt to contact by telephone had resulted in leaving nothing more than a message for one of these two workers. **Isratex, Inc.,** 94 INA 056 (Apr. 28, 1995).

We agree with the finding of the CO that Employer's attempt to contact Ms. Townsend does not constitute a reasonable good faith effort. It follows that the Employer failed to prove that this U. S. applicant was rejected for reasons that were lawful and job-related, as required by 20 CFR § 656.21((b)(6), and that we find certification was properly denied.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 474

STONE ARCH HEALTH CARE, INC., Employer,
NUNILON RUBIA, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 10, 1997